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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,

Petitioner,

vs.

DREW PEARSON, ROBERT S. ALLEN AND VAN REES PRESS, INC., ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

GIBBS L. BAKER,
HORACE S. WHITMAN,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of The Washingtonian Publishing Company, Inc., respectfully shows to this Honorable Court:

I.

Summary Statement of the Matter Involved.

The Washingtonian Publishing Company, Inc., published a magazine called "The Washingtonian." The issue for the month of December, 1931, contained an article called "The Mills of the Gods." This issue was published containing notice of copyright required under the Copyright Statute, U. S. C. A., Title 17, Secs. 9 and 18 (R. 27, (3) and (4)).

Drew Pearson had been employed in the publication of the magazine during the months of October and November, 1931 (R. 10, (b)). Two copies of the December issue of the magazine were deposited in the copyright office, Washington, D. C., on the 21st day of February, 1933 (R. 28, (8)). Between the date of publication of the magazine in December, 1931, and the date of said deposit of copies, Drew Pearson and Robert S. Allen published on August 25, 1932, through Liveright, Inc., a book entitled "More Merry-Go-Round," as written by themselves, and published therein a chapter practically identical with the article "The Mills of the Gods" that had been published in "The Washingtonian" in December, 1931, with the notice of copyright therein. Van Rees Press, Inc., printed the book, and the book "More Merry-Go-Round" contained the usual claim of copyright, and two copies thereof were deposited by Liveright, Inc., in the copyright office, Washington, D. C. (R. 28, (6) and (7)).

On March 8, 1933, the Washingtonian Publishing Company, Inc., filed suit in the District Court of the United States for the District of Columbia for infringement of its copyright against Drew Pearson, Robert S. Allen, Van Rees Press, Inc., and Liveright, Inc. (R. 28, (9)); the latter corporation thereafter became bankrupt and did not appeal from the lower court's decision (R. 34). The lower court made findings of fact and conclusions of law that the publication "More Merry-Go-Round" was an infringement of the copyright of the Washingtonian Publishing Company, Inc., and that company is entitled to damages therefor (R. 27-29). The defendants in the lower court noted an appeal, and that court required them to put up a supersedeas bond of five thousand dollars pending appeal (R. 27-30). Upon appeal to the United States Court of Appeals for the District of Columbia by Pearson *et al.*, that court reversed the lower court, upon the ground that the

deposit of the copies in the copyright office more than a year after the publication, was not a prompt deposit and therefore barred action for infringement by pirating the copyrighted work (R. 33-42).

II.

Question Involved.

The sole question involved is, whether under the Copyright Law enacted March 4, 1909, U. S. C. A., Title 17, Secs. 9 and 18, the *prompt* deposit of copies of the work, containing the copyright notice, in the copyright office, is a prerequisite to the right to maintain an action for the infringement of the copyright obtained under Sections 9 and 18 of that Act.

III.

Reasons Relied Upon for the Allowance of the Writ.

1. The United States Court of Appeals for the District of Columbia has decided an important question of Federal law which has not been, but which should be, settled by the Supreme Court of the United States.

2. The United States Court of Appeals for the District of Columbia has rendered a decision in conflict with the decision of the United States Court of Appeals for the 2nd Circuit, *i. e.*, in *Lumiere* v. *Pathe Exchange*, 275 Fed. 428.

3. The United States Court of Appeals for the District of Columbia has decided an important question of Federal law in a way probably untenable and contrary to the United States Copyright Act.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia commanding that court

to certify and to send to this Court for its review and determination, on a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 6921, of the April Term, 1938, Drew Pearson, Robert S. Allen, Liveright, Inc., *et al.*, Appellants, *vs.* The Washingtonian Publishing Company, Inc., and that the said judgment and decree of the said United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises, as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Court of Appeals for the District of Columbia was rendered on the 25th day of April, 1938, and has not yet been officially reported. It is printed in the Record ,pp. 33-42.

II.

Jurisdiction.

1. The Act of February 13, 1925, Chapter 229, Sec. 240, 43 Stat. 936, U. S. C. A., Title 28, Sec. 347, provides as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.
>
> "(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

2. The judgment sought to be reviewed was rendered by the United States Court of Appeals for the District of

Columbia on the 25th day of April, 1938. The petition for writ of certiorari was filed herein with the Clerk of this Court on the 25th day of July, 1938.

3. The action of the United States Court of Appeals for the District of Columbia in reversing the lower court was a final determination by that court that the Washingtonian Publishing Company, Inc., was not entitled to recover against Drew Pearson, Robert S. Allen and Van Rees Press, Inc., for the infringement of copyright involved.

III.

Statute Involved.

The statute involved is U. S. C. A., Title 17, Sections 9, 12 and 13:

> "SEC. 9. Publication of work with notice.—Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 21 of this title.
>
> "SEC. 12. Deposit of copies after publication; action or proceeding for infringement.—After copyright has been secured by publication of the work with the notice of copyright as provided in section 9 of this title, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign State or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have

been produced in accordance with the manufacturing provisions specified in section 15 of this title; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section 11 of this title, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.

"SEC. 13. Same; failure to deposit; demand; penalty.—Should the copies called for by section 12 of this title not be promptly deposited as provided in this title, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of $100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void."

IV.

The Facts.

The facts with the record page references are stated in the petition for writ, pages 1 and 2.

V.

Specification of Error.

The United States Court of Appeals for the District of Columbia erred in holding that failure to make *prompt* deposit of copies in the copyright office, Washington, D. C., barred the petitioner's right to sue for infringement of its copyright secured under Sections 9 and 18 of the Copyright Act (U. S. C. A., Title 17, Secs. 9 and 18).

VI.

ARGUMENT.

Summary of Argument.

1. The question involved is an important question of Federal law.

2. The decision of the United States Court of Appeals for the District of Columbia is in conflict with the decision of the United States Court of Appeals for the 2nd Circuit in the case of *Lumiere* v. *Pathé Exchange,* 275 Fed. 428.

3. The decision of the United States Court of Appeals for the District of Columbia is untenable and contrary to the United States Copyright Act.

Important Question of Federal Law.

1. The Act of March 4, 1909, Chapter 320, U. S. C. A., Title 17, wrought an organic change in the then existing copyright law. Under Section 9 of this Act, a person might for the first time "secure copyright for his work by publication thereof with notice of copyright."

National Cloak, etc., Co. v. *Kaufman,* 189 Fed. 215;
New York Times Co. v. *Star Co.,* 195 Fed. 110.

The United States Court of Appeals for the District of Columbia has held in this case that *prompt* deposit of copies is now a prerequisite to suit for infringement of copyright, following the Court's interpretation of the old law. The question in this case is, therefore, an important question, because it involves not only the protection of a copyright but the very existence thereof.

A copyright is the sole right to use and publish a literary work. Its essence is its exclusiveness. Inability to enforce and protect that exclusiveness destroys the copyright itself, and avoids the language of the statute expressly bestowing that right for a period of twenty-eight years, upon publication with notice of claim of copyright.

Notwithstanding the attempt of the United States Court of Appeals for the District of Columbia to limit its decision to infringement occurring prior to filing of copies, its holding that *prompt* deposit of copies is a condition precedent to suit, must apply equally to any infringement after a tardy filing of copies.

There is no justification whatever for the statement of the United States Court of Appeals for the District of Columbia (R. 41), that there was an apparent abandonment of the copyright. The notice of copyright on the issue of the magazine in question was notice to all the world of the existence of the petitioner's copyright, and the respondents' use of the article in their book must be construed to have been with a full knowledge of the statutory penalties imposed.

Bently v. *Tibbals*, 223 F. (2d C. C. A.), 247, 253;
Stecher Lithographic Co. v. *Dunston Lithograph Co.* (D. C. N. Y.), 233 Fed. 601, 603.

No acts of abandonment of the petitioner's copyright are shown. There has been no interpretation of the pertinent part of Section 12 of the Copyright Law by this Court.

The Decision of the Court Below is in Conflict With the Decision of the Circuit Court of Appeals of the Second Circuit.

2. In the case of *Lumiere* v. *Pathe Exchange*, 275 Fed. 428, the plaintiff, a photographer, sold in June, 1918, to Dolores Casinelli, a motion picture actress, some pictures of her "marked as copyrighted by the plaintiff." In April or May of 1919, the defendants infringed the plaintiff's said copyright. In August, 1919, the plaintiff deposited two copies of each photograph and obtained a certificate of registration for photographs not for sale. Thereafter on August 26, 1919, the plaintiff sued the defendant for infringement, accounting and injunction. On April 17, 1920, Judge Learned Hand dismissed the bill "without costs or prejudice and with leave to commence a new action." All parties appealed.

After deciding that the plaintiff had a right to copyright the photographs, and that his copyright thereof had been infringed by the defendants, the Court held that the plaintiff's delay of some fourteen months in depositing copies did not preclude his suit for infringement which occurred some four months prior to said deposit of copies. In this connection the Court said:

> "The plaintiff's copyright was established by the publication with notice of copyright as against all the world whether with or without actual notice and could not be declared void because not 'promptly' followed by deposit of copies as required by the act except by action of the register of copyrights under section 13, which was not taken."

The Court then proceeded to affirm the action of the trial court on the ground that the plaintiff's certificate of registration was for photographs not for sale, and to advise the

plaintiff that, upon proper registration, the plaintiff might maintain another action for said infringement.

In *Mittenthal* v. *Berlin*, 291 Fed. 714, Judge Learned Hand, following the Court of Appeals in the case of *Lumiere* v. *Pathe Exchange, supra,* said:

> "• • • The time of deposit is clearly of secondary importance. Even a failure to deposit promptly does no more under section 12 (Comp. St. sec. 9534) than subject the owner to a demand, failure to comply with which exposes him to a fine of $100 and the cost of the two copies which he should have furnished. He may mend his case even in the event of long delinquency. • • •"

In the case at bar, the pertinent facts are almost identical with those in the *Lumiere* case above cited, except that there are no grounds for dismissal even "without costs or prejudice and with leave to commence a new action" because proper certificate of registration was duly obtained. The petitioner deposited two copies and obtained a proper certificate of registration some fourteen months after obtaining its copyright and some six months after infringement thereof by the defendants. Nevertheless the Court of Appeals reversed the trial court's decree, holding that the petitioner's copyright was wrongfully infringed by the defendant and that the petitioner is entitled to damages therefor.

The Court of Appeals seeks to distinguish the *Lumiere* case from the one at bar on the strength of Judge Hough's concurring opinion in the former case. It is noted, however, that the other two judges did not concur with Judge Hough.

The Court in the *Lumiere* case would not have indicated that the plaintiff might renew his suit without having decided that the deposit of copies four months after infringement of copyright and fourteen months after the first publication with claim of copyright (facts almost identical with

the facts in the present case) did not bar action or proceedings for such infringement. Consequently, the decision of the court below in the case at bar is directly in conflict with the *Lumiere* case. The English courts place the same construction upon the English Copyright Law as in *Lumiere* v. *Pathe Exchange, supra.*

Goubaud v. *Wallace,* 25 W. R. 604;
Cate v. *Devonshire Newspaper Co.,* 37 W. R. 487.

The Decision of the Court Below is Untenable and Contrary to the Copyright Law.

3. The court below held that *prompt* deposit of copies in the copyright office is a prerequisite to a suit for the infringement of copyright. We contend that a proper construction of the Act requires simply deposit of copies before filing suit.

A statute should be construed in accordance with the manifested intent of the lawmaker. Such intent should be primarily ascertained from the language and context of the Act itself, and next from the purpose and object for which the statute was enacted.

Section 12 of the Act provides that "No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to deposit of copies and registration of such work shall have been complied with." The Court of Appeals erroneously imported into this provision of the section the word "promptly," which appears in the first part of the section. To fit the word "promptly" into the last quoted part of the section, the Court found it necessary, in effect, to alter the language by changing the word "until," a word of limitation, to "unless," a word of condition. The former Act of March 3, 1891, 26 Stat. Chap. 566, p. 1107, provided that

> "no person shall be entitled to a copyright *unless* he shall, on or before the day of publication in this or any

> foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian or Congress, at Washington, D. C., a printed copy of the title of the book * * *." (Italics ours.)

Whereas under the present act obtaining a copyright is not conditioned upon deposit of copies although suit for infringement cannot be maintained until copies have been deposited.

Section 13 of the Act prescribes the penalty for failure to file copies *promptly;* it reads in part:

> "Should the copies called for by section 12 of this title not be promptly deposited as provided in this title, * * *."

It is significant that here the word "promptly" is used with reference to deposit of copies, as provided in the first part of Section 12; however, in the last part of Section 12, relating to the bringing of suit for infringement, the word "promptly" is not used, although it is used in practically the same phraseology in the first sentence of Section 13 as well as the preceding sentence of Section 12. Had it been intended to require *prompt* deposit of copies as a prerequisite to suit for infringement, the word "promptly" would have been expressly used in that connection.

Section 9 of the Act confers full copyright upon the author upon publication with notice of copyright. This claim of copyright on the publication gives notice to the public of the copyright holder's exclusive right to use and publish. Section 13 provides the sole method of forfeiture of that copyright. Sections 12 and 13 are to be construed together. The decision of the Court of Appeals renders the penalty of voidance of copyright provided by Section 13, but a hollow threat. By the time the penalty becomes applicable it is no longer possible to *promptly* deposit copies, as such prompt-

ness is measured from the date of publication with notice of copyright. As an unenforceable copyright is obviously worthless, the voidance thereof would be an idle gesture. The Court of Appeals relies heavily upon the case of *Koppel* v. *Downing*, 11 App. D. C. 93, and Weil, American Copyright Law (1917) (R. 40). Weil in his work, pages 307-312, expresses considerable doubt as to the meaning of Sections 12 and 13, *supra*. He sets forth the arguments both for and against the construction here contended for. His conclusion is that an adjudication at an early date of the meaning of the "doubtful provisions" of Section 12 "is most desirable." The quotation from Weil in the opinion of the lower court (R. 40), must not be considered alone, but in conjunction with his entire discussion as to the meaning of Sections 12 and 13. His statement of the objects of the Act fails to take into account the organic changes in the law of 1909 granting the copyright without deposit of copies, or the effect of the publication with claim of copyright.

The case of *Koppel* v. *Downing, supra,* has no application to this case. It was decided under a previous act which required deposit of copies as a condition precedent to vesting of copyright. The organic change wrought by the present act in granting full copyright simply upon publication with notice thereof, makes the reasoning in this decision inapplicable to the provisions in question. In the quotation from that case by the Court of Appeals (R. 40), reference is made to a necessity for a "true and correct official registry." Under the present act the public is put upon notice by the requirement of publication with notice of copyright.

Sections 56, 59 and 60 of the present Act, appearing for the first time in the Copyright Law, empower the Register of Copyrights and the Librarian of Congress to destroy or give away copies of copyrighted material. It follows, there-

fore, that Congress did not intend that the copyright office or the Library of Congress should maintain or keep on hand all works deposited there.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

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